STATE OF MINNESOTA
IN SUPREME COURT
No. C8-84-1650

In re:

Amendment to
Rules of Professional Conduct

SECOND SUPPLEMENTAL AND AMENDED PETITION OF MINNESOTA STATE BAR ASSOCIATION

September 24, 2004

MINNESOTA STATE BAR ASSOCIATION
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TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

Petitioner Minnesota State Bar Association ("MSBA") respectfully submits this Second Supplemental and Amended Petition to supplement its Petition for Amendment of the Minnesota Rules of Professional Conduct and its Supplemental and Amended Petition.

1. By Petition dated September 19, 2003, Petitioner MSBA requested that this Court amend the Minnesota Rules of Professional Conduct. That Petition was heard on May 18, 2004, and is pending before this Court.

2. Petitioner filed its Supplemental and Amended Petition to supplement its original Petition for Amendment of the Minnesota Rules of Professional Conduct on January 26, 2004. That Petition was also heard on May 18, 2004, and is pending before the Court.

3. In the original Petition, Petitioner reported that it was engaged in ongoing review of the rules and, in particular, that it was considering whether to make further recommendations relating to the ABA's August 2003 amendments to Model Rules 1.10. *See* Petition ¶ 11, at 4.

4. The MSBA Rules of Professional Conduct Committee has studied the issues relating to Rule 1.10, and issued its Report dated August 11, 2004. That report is attached to this Second Supplemental and Amended Petition as Exhibit A. The rationale for each of the recommended amendments to Rule 1.10 set forth below is set forth in the MSBA Committee Report.

5. On September 17, 2004, the MSBA Assembly met and approved the recommendations made in the MSBA Committee Report and authorized the filing of this Second Supplemental and Amended Petition.

6. Petitioner MSBA believes the further modifications to the rules are appropriate and should be made as part of the comprehensive changes proposed in the original Petition.

7. Accordingly, Petitioner requests that the Court replace the requested language of proposed Rule 1.10 so it reads as follows (all marking of the changes recommended in this Second Supplemental Petition compare the recommended language to the language proposed in the September 2003 Petition).

8. Petitioner requests that the Court modify the requested language of proposed Rule 1.10 and its Comments to read as follows:

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) Except as provided by this rule, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer becomes associated with a firm, and the lawyer is prohibited from representing a client pursuant to Rule 1.9(a) or (b), other lawyers in the firm may represent that client if ~~there is no reasonably apparent risk that confidential~~

~~information of the previously represented client will be used with material adverse effect on that client because~~:

(1) ~~any confidential information communicated to the lawyer is unlikely to be significant in the subsequent matter~~ the associating lawyer submits an affidavit to the firm stating that the associating lawyer did not manage or direct the former client's matter at the policy-making level, exercise day-to-day responsibility for decisions in the former client's matter, sign most of the previous firm's written communications to the former client, or participate in most of the previous firm's oral communications with the former client, and that the associating lawyer possesses no confidential information that is likely to be material to the subsequent matter and has transmitted no confidential information about the matter to the firm;

(2) ~~the lawyer is subject to screening measures adequate to prevent disclosure of the confidential information and to prevent involvement by that lawyer in the representation~~ the firm timely screens the associating lawyer from any participation in the matter and apportions the associating lawyer no part of the fee therefrom; and

(3) ~~timely and adequate~~ the associating lawyer provides prompt written notice ~~of the screening has been provided~~ to ~~all~~ any affected ~~clients~~ former client to enable the client to ascertain compliance with the provisions of this rule.

(c) A firm shall not be disqualified because it has associated a lawyer who is prohibited from representing a client pursuant to Rule 1.9(a) or (b) if:

(1) the associating lawyer submits the affidavit and provides the notice required by paragraph (b);

(2) the firm does not know that any of the affidavit's statements are incorrect; and

(3) the firm timely screens the associating lawyer from any participation in the matter and apportions the associating lawyer no part of the fee therefrom.

~~(c)~~ (d) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

~~(d)~~ (e) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

~~(e)~~ (f) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is

essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b) ~~and (c)~~ - (d).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(l) and 5.3.

[5] When the conditions of paragraphs (b) and (c) are satisfied, the imputed conflict of interest is removed, and consent to the new representation is not required. Paragraph (c)'s procedures should facilitate judicial review of the screening procedures or court supervision of their implementation and compliance.

[6] Paragraph (b)(1) refers to communications with a client. As stated in Comment [7] to Rule 4.2, communication with an organizational client is communication with an officer, director, employee, or shareholder of the organization "who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

[7] Notice under paragraph (b)(2) should be given as soon as practicable after the need for screening becomes apparent and should include a description of the screened lawyer's prior representation and the screening procedures employed. Pursuant to Rule 4.2, the notice should be directed to the former client's lawyer if the former client is represented by counsel.

[8] The requirements for screening are specified in Rule 1.0(*l*) and Comments [9] and [10] to Rule 1.0. Paragraphs (b)(2) and (c)(3) do not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

~~[5]~~ [9] Rule 1.10~~(c)~~(d) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

~~[6]~~ [10] Rule 1.10~~(d)~~(e) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(f).

~~[7]~~ [11] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11~~(d)~~(e), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

~~[8]~~ [12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

9. The American Bar Association has continued to follow the progress of its Ethics 2000 initiative, and maintains a website identified in the ABA Report and included in the MSBA's Supplemental and Amended Petition dated January 26, 2004, Exhibit B. An updated Table of Status of State Review of Professional Conduct Rules as of September 22, 2004, from the ABA, is attached hereto as Exhibit B.

Based upon the foregoing authorities, Petitioner MSBA requests that its proposed modifications to Rules and Comments as set forth in paragraph 8 above be

adopted as part of the comprehensive amendments to the Minnesota Rules of Professional Conduct requested in Petitioner's September 19, 2003, Petition in this matter.

Dated: September ____, 2004.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION
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Its President

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ATTORNEYS FOR PETITIONER
Minnesota State Bar Association

This report was approved by the MSBA Assembly on September 17, 2004

Report and Recommendations to the MSBA
MSBA Rules of Professional Conduct Committee
August 11, 2004

The MSBA Rules of Professional Conduct Committee submits the following report and recommendation regarding proposed amendments to Rule 1.10 of the Minnesota Rules of Professional Conduct regarding screening of lateral hires. The committee asks the MSBA to supplement its pending recommendation to the Minnesota Supreme Court by petitioning the Court to amend Rule 1.10 as outlined below.

BACKGROUND

The Code of Professional Responsibility, in effect in Minnesota from 1970 to 1985, contained no provision regarding lateral hire conflicts for lawyers in private firms. In *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 731-32 (Minn. 1983), upholding the trial court's refusal to disqualify a firm that hired and screened a lawyer who previously represented an opposing party, the court adopted the following standard for disqualification motions:

(a) Considering the facts and the issues involved, is there a substantial, relevant relationship or overlap between the subject matters of the two representations?
(b) If so, then certain presumptions apply: First, it is presumed, irrebuttably, that the attorney received confidences from the former client and he or she will not be heard to claim otherwise. Second, it is also presumed, but subject to rebuttal, that these confidences were conveyed to the attorney's affiliates.
(c) Finally, at this stage, if reached, the court weighs the competing equities.

(Citations omitted.)

In 1985, the Minnesota Supreme Court adopted the Minnesota Rules of Professional Conduct, Rule 1.10(b) of which did not provide for screening but also did not impute conflicts unless the lateral hire had material confidential information. In 1999, the court amended Rule 1.10(b) to its present form, which allows continued representation by a firm that has hired a lawyer previously employed by a firm that represented an opposing party only if:

there is no reasonably apparent risk that confidential information of the previously represented client will be used with material adverse effect on that client because:
(1) any confidential information communicated to the lawyer is unlikely to be significant in the subsequent matter;
(2) the lawyer is subject to screening measures adequate to prevent disclosure of the confidential information and to prevent involvement by that lawyer in the representation; and
(3) timely and adequate notice of the screening has been provided to all affected clients.

In *Lennartson v. Anoka-Hennepin Independent School District*, 662 N.W.2d 125, 132, 135 (Minn. 2003), upholding the disqualification of a firm that hired and screened a lawyer previously employed by a firm that represented an opposing party, the court ruled that Rule

1.10(b) rather than *Jenson* controlled and that Rule 1.10(b)'s requirements were conjunctive so that screening and notice would not prevent disqualification of a firm that hired a lawyer who possessed significant information. Significantly, the court added:

> Further, to the extent that the interpretation we give to the plain meaning of our rule may be perceived as failing to acknowledge the nature of today's law practice, we conclude that these concerns are best addressed through a comprehensive reexamination of the rule rather than review under the limited facts of this particular case.

Id. at 134-35.

This request for a comprehensive reexamination of Rule 1.10(b) came too late to be acted upon by the MSBA Task Force on the ABA Model Rules of Professional Conduct, which issued its report to the MSBA on June 12, 2003, one week after *Lennartson*. Accordingly, in paragraph 11 of its September 19, 2003, Petition for adoption of amended Rules of Professional Conduct, the MSBA stated, "The MSBA is undertaking to review and decide whether to make further recommendations relating to Rule 1.10(b), dealing with lateral-hire conflicts . . . ."

Your committee has understood its charge as limited to the concerns raised by attorneys moving from one firm to another and the possible resulting imputation of any conflicts of interest to the second firm. The Committee also has understood its charge as considering whether the examination of *Lennartson* and Rule 1.10(b) should result in a recommendation to amend Rule 1.10(b) or to leave it as recommended by the MSBA in 2003.

The committee reviewed rules adopted in jurisdictions that permit representation when a disqualified lawyer is screened and reviewed articles written by various commentators. See Attachments 1, 2, 3, and 6.

The practice of law has changed substantially in certain respects in recent decades. The practice of spending one's whole career in one law firm has diminished; the mobility of lawyers, primarily associates but also partners, has increased greatly. The difficulties that mobility has caused to the transferring lawyers and the law firms to which they transfer is generally known. Your committee has solicited additional specific evidence of the implications of the transfers on transferring lawyers and firms and is impressed with how common and generally experienced the difficulties of those transfers are. Members of the committee met with the leaders of the New Lawyers Section and with several individual lawyers, all of whom were associates, who related their experiences in recent transfers. Committee members had conversations with several hiring and recruitment partners in large law firms. See Attachment 5.

A lawyer typically leaves a firm with confidential information about dozens of matters. Many litigation and transactional matters involve multiple parties (with attendant multiple lawyers and law firms). Further, with greater specialization, a lawyer may have only a limited number of other firms to which to carry a specialized expertise. Oftentimes the only clear resolution is to obtain waivers from affected clients.

Obtaining waivers raises its own set of problems. A lawyer seeking to transfer from a law firm must either advise the firm of the plan or leave with no certainty as to the offer from the other law firm, which must check out all the conflicts and will want to obtain waivers whenever possible. The clients from whom waivers are sought have little or no incentive to grant the waivers. Lawyers and law firms have related situations where lawyers seeking to transfer have waited months for waivers from uncertain or large corporate clients.

A client of a firm to which the lawyer transfers may lose representation by long-time attorneys on a litigation matter when a court grants a disqualification motion based on imputation from the transferring lawyer to the firm.

Proponents of change argue that attorney conflict-of-interest dilemmas occur with great frequency. The factors alleged most often to contribute to that phenomenon are the growth of megafirms in defined areas of the law with offices in many cities, multiplying the situations in which a firm finds itself representing adverse or potentially adverse clients, and the increasing mobility of lawyers, especially in the area of corporate and securities law. The primary implication of imputing moving attorneys' conflicts to their new firms is the resultant great difficulty or impossibility of the move. The resolution for the concerns is to incorporate screening into the rule to obviate imputation of the conflict.

Opponents of screening argue that screening still leaves attorneys with conflicts of interest and clients' confidential information in the camp of the adversary--clear violations of the bedrock duties of loyalty to clients and confidentiality of client information

Your committee is unaware of any claim that screening of government employees, judges, arbitrators, mediators, and law clerks has caused any problem in any jurisdiction. Your committee has not found any evidence that the limited screening that has been allowed in Minnesota, under *Jenson* and the 1999 amendment to Rule 1.10, has caused any confidentiality breaches or any lessening of the public's confidence in the legal profession, although some commentators and the *Lennartson* opinion have expressed general concerns in this regard. The committee is also convinced that screening has worked well in the states that have had enhanced screening opportunities for a number of years, e.g., Oregon and Washington.

Your committee presented a report and recommendation at the MSBA Convention in June 2004, but withdrew that report and recommendation because of opposition from the Lawyers Professional Responsibility Board. After receiving valuable input from members of the LPRB Rules Committee, conducting a joint meeting with that committee, and receiving the recommendation of a working group comprising members of the MSBA and LPRB committees, your committee presents the following:

RECOMMENDATION

The committee recommends that the MSBA modify its proposed Rule 1.10 to read as follows (comparisons throughout are to the MSBA proposed rules currently before the Court):

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) Except as provided by this rule, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer becomes associated with a firm, and the lawyer is prohibited from representing a client pursuant to Rule 1.9(a) or (b), other lawyers in the firm may represent that client if ~~there is no reasonably apparent risk that confidential information of the previously represented client will be used with material adverse effect on that client because~~:

(1) ~~any confidential information communicated to the lawyer is unlikely to be significant in the subsequent matter~~ the associating lawyer submits an affidavit to the firm stating that the associating lawyer did not manage or direct the former client's matter at the policy-making level, exercise day-to-day responsibility for decisions in the former client's matter, sign most of the previous firm's written communications to the former client, or participate in most of the previous firm's oral communications with the former client, and that the associating lawyer possesses no confidential information that is likely to be material to the subsequent matter and has transmitted no confidential information about the matter to the firm;

(2) ~~the lawyer is subject to screening measures adequate to prevent disclosure of the confidential information and to prevent involvement by that lawyer in the representation~~ the firm timely screens the associating lawyer from any participation in the matter and apportions the associating lawyer no part of the fee therefrom; and

(3) ~~timely and adequate~~ the associating lawyer provides prompt written notice ~~of the screening has been provided~~ to ~~all~~ any affected ~~clients~~ former client to enable the client to ascertain compliance with the provisions of this rule.

(c) A firm shall not be disqualified because it has associated a lawyer who is prohibited from representing a client pursuant to Rule 1.9(a) or (b) if:

(1) the associating lawyer submits the affidavit and provides the notice required by paragraph (b);

(2) the firm does not know that any of the affidavit's statements are incorrect; and

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~~(c)~~ (d) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the fomerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

~~(d)~~ (e) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

~~(e)~~ (f) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b) ~~and (c)~~ - (d).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an

opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(l) and 5.3.

[5] When the conditions of paragraphs (b) and (c) are satisfied, the imputed conflict of interest is removed, and consent to the new representation is not required. Paragraph (c)'s procedures should facilitate judicial review of the screening procedures or court supervision of their implementation and compliance.

[6] Paragraph (b)(1) refers to communications with a client. As stated in Comment [7] to Rule 4.2, communication with an organizational client is communication with an officer, director, employee, or shareholder of the organization "who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

[7] Notice under paragraph (b)(2) should be given as soon as practicable after the need for screening becomes apparent and should include a description of the screened lawyer's prior representation and the screening procedures employed. Pursuant to Rule 4.2, the notice should be directed to the former client's lawyer if the former client is represented by counsel.

[8] The requirements for screening are specified in Rule 1.0(*l*) and Comments [9] and [10] to Rule 1.0. Paragraphs (b)(2) and (c)(3) do not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

~~[5]~~ [9] Rule 1.10~~(c)~~(d) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated

lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

~~[6]~~ [10] Rule 1.10~~(d)~~(e) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(f).

~~[7]~~ [11] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11~~(d)~~(e), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

~~[8]~~ [12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

ANALYSIS

The committee recommends that Rule 1.10 be amended as specified above to facilitate a lawyer's legitimate interest in being able to move to a new firm without compromising any former client's interests in loyalty or confidentiality.

A firm will be more willing to hire a new lawyer when it can rely on (1) the lawyer's affidavit under Rule 1.10(b)(1) regarding the lawyer's lack of significant prior involvement in a matter and lack of material confidential information, (2) the firm's screening under Rule 1.10(b)(2) and (c)(3), and (3) the lawyer's providing appropriate notice to the former client under Rule 1.10(b)(3).

Rule 1.10(b)(1) safeguards the former client's interest in loyalty because the former client will not identify as "my lawyer" a lawyer who did not manage or direct the client's matter at the policy-making level, exercise day-to-day responsibility for decisions in the matter, sign most of

the previous firm's written communications to the client, or participate in most of the previous firm's oral communications with the client.

Rule 1.10(b) and (c) safeguard the former client's interest in confidentiality by requiring (1) the associating lawyer to state under oath that the lawyer possesses no confidential information that is likely to be material to the subsequent matter and has transmitted no confidential information about the matter to the firm, (2) the firm not to know that any of the affidavit's statements are incorrect, (3) the firm to timely screen the lawyer from any participation in the matter, and (4) the associating lawyer to provide the former client prompt written notice to enable the client to ascertain compliance with Rule 1.10's provisions. Rule 1.0(*l*) specifies:

> "Screened' denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

Rule 1.0's Comments specify:

> [9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.
>
> [10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

As stated above, the committee reviewed versions of the rule adopted in jurisdictions that permit representation when a disqualified lawyer is screened, including rules adopted by New Jersey and Arizona. See Attachment 1. The committee also reviewed the rule originally proposed by the ABA's E2K Commission. See Attachment 2.

The recent Rule 1.10 amendments and proposed amendments show a spectrum of views on how to balance the values involved. See Spectrum in Attachment 4. (The "MSBA Subcommittee" listing on the spectrum refers to the *previous* recommendation that the committee withdrew in June.) The spectrum, in order of most restrictive to least restrictive, is as follows.

A. The ABA House of Delegates decided that *no* lateral hires with material confidential information may be screened, except by client consent, and that *all* conflicts may be screened for former government officers and employees, judges, arbitrators, mediators, and law clerks under Rule 1.11 and Rule 1.12. Substantially all jurisdictions have adopted the screening provisions of ABA Model Rules 1.11 and 1.12.

B. Current Minnesota Rule 1.10(b) and Restatement (Third) of the Law Governing Lawyers § 124 (1998) allow screening only where the confidential information known to the lateral is "unlikely to be significant in the subsequent matter."

C. Arizona Rule 1.10(d), which became effective in December 2003, allows screening unless the lateral had a "substantial role" in a litigation matter involving the old and new firms. Massachusetts and Tennessee take this position as well.

D. New Jersey Rule 1.10(c), which became effective in September 2003, allows screening where "the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility." "Primary responsibility" denotes "actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions."

E. The ABA Ethics 2000 Commission proposed Rule 1.10(c) provided that *all* lateral hire conflicts could be screened. Delaware, Illinois, Michigan, Oregon, and Washington take this position.

The committee concluded that alternatives A, B, and C were functionally very similar, because law firm hiring partners could not confidently distinguish among lateral hire candidates who had some involvement in an adverse proceeding as to whether their confidential information was "material" or apt to be "significant," or as to whether their role was "substantial."

The committee also concluded that its proposed formulation, which draws from several other states' provisions, appropriately safeguards the client's need to be assured of confidentiality and the need of lawyers, especially associates who most often are the candidates looking for new employment, for reasonable possibilities of moving from firm to firm.

Rule 1.10(b)'s introductory portion is to the same effect as that of current Minnesota Rule 1.10(b). The words "there is no reasonably apparent risk that confidential information of the previously represented client will be used with material adverse effect on that client because" are omitted from paragraph (b)'s introductory portion in order to move their substance to proposed Rule 1.10(b)(1).

The words of proposed Rule 1.10(b) are new. The requirement for the associating lawyer to submit an affidavit to the firm places the obligation on the lawyer in the best position to bear the obligation.

Paragraph (b)(1)'s requirement that the associating lawyer did not manage or direct the former client's matter at the policy-making level or exercise day-to-day responsibility for decisions in the matter derives from the definition used to determine whether a lawyer had primary responsibility for a matter under New Jersey Rule 1.10(c). Paragraph (b)(1)'s requirement that the associating lawyer did not sign most of the previous firm's written communications to, or participate in most of the previous firm's oral communications with, the former client is new.

Paragraph (b)(1)'s requirement that the associating lawyer possess no confidential information that is likely to be material to the subsequent matter captures the substance of the language in current Minnesota Rule 1.10(b)'s introductory portion, "there is no reasonably apparent risk that confidential information of the previously represented client will be used with material adverse effect on that client because" and the language in current Minnesota Rule 1.10(b)(1) "any confidential information communicated to the lawyer is unlikely to be significant in the matter." Paragraph (b)(1) specifies "material" rather than "significant." Apart from Rule 1.10, the current (and proposed) Minnesota Rules of Professional Conduct use the word "significant" only twice, both times in relation to money. See Rule 6.1(b) (pro bono services to organization where payment of standard fees would significantly deplete the organization's economic resources), 7.3 (solicitation when significant motive is pecuniary gain). The current Minnesota Rules Terminology section (unchanged in proposed Rule 1.0(m)) specifies, "'Substantial' when used in reference to degree or extent denotes a material matter of clear and weighty importance." Using "material" to define "substantial" without any definition of "material" indicates that the meaning of "material" is known. The current and proposed Minnesota Rules and the ABA Model Rules use "material" many times within the conflicts rules, including Rule 1.10(c): "(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9[(c)] that is material to the matter."

Paragraph (b)(1)'s requirement that the associating lawyer has transmitted no confidential information about the matter to the firm derives from Washington Rule 1.10(b)(3).

Proposed Rule 1.10(b)(2) substitutes "the firm timely screens the associating lawyer from any participation in the matter and apportions the associating lawyer no part of the fee therefrom" for "the lawyer is subject to screening measures adequate to prevent disclosure of the confidential information and to prevent involvement by that lawyer in the representation" in order to match the language with that used in current (and proposed) Minnesota Rules 1.11(b)(1) and 1.12(b)(1) regarding former government officers and employees and former judges, arbitrators, mediators, or other third-party neutrals and in ABA Ethics 2000 Commission proposed Rule 1.10(c) and in many states' versions of Rule 1.10.

In paragraph 1.10(b)(3), "provides prompt written notice" is substituted for "timely and adequate notice . . . has been provided" to make clear that it is the associating lawyer's duty to provide the notice. The words "to any affected former client to enable the client to ascertain compliance with the provisions of this rule" are substituted for "of the screening . . . to all

affected clients" in line with ABA Ethics 2000 Commission proposed Rule 1.10(c) and state versions of Rule 1.10 that follow that formulation, e.g., Arizona and New Jersey.

As stated in Comment [6], paragraph (c)'s procedures should facilitate judicial review of the screening procedures or court supervision of their implementation and compliance.

The committee carefully considered how the concern expressed in *Lennartson* for maintaining "confidence in the legal profession" and the specific concern for the former client of the migrating lawyer can best be addressed. These considerations were balanced with a concern for reasonable job mobility, especially among associates. The committee believes that its proposed Rule 1.10 appropriately facilitates a lawyer's legitimate interest in being able to move to a new firm without compromising any former client's interests in loyalty or confidentiality.

Respectfully submitted,

MSBA Rules of Professional Conduct Committee

Ken Kirwin, Chair

ATTACHMENTS

1. New Jersey Rule 1.10(c) and Arizona Rule 1.10(d)

2. ABA E2K Commission proposed Rule 1.10(c)

3. State Rules that Permit Representation When a Disqualified Lawyer is Screened

4. Spectrum of Lateral Hire Conflict Screening Rules

5. Recruiting/Hiring Partner Comments: Keith Moheban, *Comments re: Rule 1.10* (Mar. 8, 2004 e-mail).

6. Bibliography

NEW JERSEY RULE 1.10(c)

When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under RPC 1.9 unless:

(1) the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

Note: New Jersey defines "primary responsibility" to "denote actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions."

ARIZONA RULE 1.10(d)

When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under ER 1.9 unless:

(1) the matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by ER 1.11.

ABA ETHICS 2000 COMMISSION REPORT RULE 1.10(c)

When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

STATE RULES THAT PERMIT REPRESENTATION WHEN A DISQUALIFIED LAWYER IS SCREENED

Arizona Rule 1.10(d)

Delaware Rule 1.10(c)

Illinois Rule 1.10(b), (d)

Kentucky SCR 3.130 (1.10)

Maryland Rule 1.10(b), (c)

Massachusetts Rule 1.10(d), (e)

Michigan Rule 1.10(a)

Montana Rule 1.10(c)

New Jersey Rule 1.10(c)

North Carolina Rule 1.10(c)

Oregon Disciplinary Rule 5-105

Pennsylvania Rule 1.10(b), (c)

Tennessee Rule 1.10(c)

Washington Rule 1.10(b)

From: Moheban, Keith [keith.moheban@leonard.com]
Sent: Friday, March 05, 2004 17:43
To: Wagenius, Dwight
Subject: Comments re: Rule 1.10

Dwight -- Per your request I'm providing you some of my experiences in the application of Rule 1.10 in the context of making lateral hires. As a member of Leonard, Street's ethics commitee, I am frequently called upon to ensure compliance with Rule 1.10 in the context of such hiring. In general, compliance with the rule can require a great deal of effort and analysis, particularly when hiring attorneys who have worked in this market for extended periods of time at competing large law firms. Further, there are many instances where it appears the rules do not really provide the intended benefits to the affected clients, and where the rule mandates action that might actually be a detriment to the client's interests. In these instances there is room to consider revisions to the rule.

Specific comments:

1. Where the incoming lawyer has been directly involved in a current matter adverse to our firm, the requirements of the rule are appropriate and necessary to ensure protection of client confidences and zealous advocacy. Here, the requirements of screening and notice are essential. One could argue persuasively that screening should be deemed sufficient to protect client interests, and that client "consent" should not be required. The current rule does not literally require consent (requiring only notice) but in practical effect it does require consent. If the client is notified and unhappy with the cross over of the lawyer, the lateral hire and the new law firm are subject to potential disciplinary complaints or to disqualification. Because the analysis of the Rule is subjective, there is no certain way to protect against such consequences. Given the realities of modern big firm law practice, mobility of lawyers has been and will be seriously affected unless the Rule is revised to provide a certain means for ensuring protection of the client. This could be a Rule that provides conclusively that a wall protects client interests.

2. Where the incoming lawyer has not been directly involved in a current matter adverse to our firm, but where other members of the incoming lawyer's firm are engaged in matters adverse to us, the rule requires a subjective determination as to whether: (1) the lawyer has acquired confidential information about that matter, and (2) whether that knowledge creates a "reasonably apparent risk" that is not mitigated by screening, notice, etc. This is problematic because it is subjective. It also is very difficult to apply with larger firms. At any given time, for example, we may be adverse to Faegre or Dorsey on dozens of matters. There will undoubtedly be dozens of imputed confict situations, and the lateral hire will not even be aware of all of them. The incoming firm will not always know that the lateral hire's firm is adverse to it, because not all representations are public. So there is a practical problem in even identifying the universe of imputed disqualification matters.

3. If the client disagrees with our determination that there is no apparent risk, we might be subject to a disqualification motion or professional discipline, and there is no definitive way to guard against it. Even if you obtain a waiver under Rule 1.10(d), that is subject again to the

lawyer's subjective determination under Rule 1.7, which I think also could be challenged by the client if, in hindsight, the client believes the lawyer's "belief" under Rule 1.7 is not reasonable.

4. We rely on screening (ethical walls) to protect confidentiality in many contexts under the rules. Rule 1.10 is odd in that if first requires you to determine that the confidential information is not significant (part (b)(1)), but then requires screening as well (part (b)(2). If the confidence is not significant, then should a wall be required at all?

5. Many think that screening and notice to affected clients also is redundant. If he confidential information is not significant (because the lawyer did not work on the matter, but may have heard something in the hallway, department meeting, etc.) and you provide screening -- should notice to the clients required as well? This points up an important issue -- in some cases providing notice to the clients may adversely affect the interests of one of the clients. Imagine situation where a matter was unresolved, but had lain dormant for quite a long time. When a lateral hire (who had no involvement in the case) comes over from the opposing firm, the Rules require notice to both parties, essentially "waking up" a case to the detriment of one of the parties who benefitted from the dormancy. This pits the obligations of Rule 1.10 against the obligations of zealous advocacy.

6. The concept of "timely and adequate notice" to affected clients is unclear. Must the notice be given before the lateral hire starts? Before the offer is made? Must it be in writing? The ambiguity forces the lateral hire to notify certain clients of an intent to leave the firm, often before the lawyer has notified the firm itself, because the hire may not go through if the client objects to the move. This is a tough one to resolve, but it is a big problem for the lateral and has discouraged and even stopped some hires.

I hope this is helpful from a big firm perspective. I'd be happy to discuss this further with you or with the committee. Thanks. Keith

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STATUS OF STATE REVIEW OF PROFESSIONAL CONDUCT RULES
(9/22/04)

State	Committee Reviewing Rules	Committee Issued Report	Supreme Court Approved Rule Amend ments	Notes
Alabama	X			State Bar Committee on Disciplinary Rules and Enforcement conducting review.
Alaska	X			Bar Association Rules of Professional Conduct Committee conducting review.
Arizona			X	Effective 12/1/03 http://www.supreme.state.az.us/media/pdf/test%20ule%2042%20%2043.pdf
Arkansas		X		Supreme Court has published proposed rules for comment. http://www.arkbar.com/whats_new/new_model_rules.html
California	X			State Bar Commission for the Revision of the Rules of Professional Conduct has issued drafts for comment. http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?sImagePath=Draft_Rules.gif&sCategoryPath=/Home/Attorney%20Resources/Ethics%20Information/Commission%20for%20the%20Revision%20of%20the%20Rules%20of%20Professional%20Conduct&sHeading=Draft%20Rules&sFileType=HTML&sCatHtmlPath=html/CRRPC_Draft-Rules.html
Colorado	X			State Bar Ethics Committee conducting review.

Connecticut	X			Bar Association Committee on Professional Ethics conducting review.
Delaware			X	Effective 7/1/03 http://courts.state.de.us/Rules/?FinalDLRPCclean.pdf
D.C.	X			Rules of Professional Conduct Review Committee conducting review.
Florida		X		Bar Board of Governors has approved amendments, which will now be considered by the Supreme Court. http://www.flabar.org/tfb/TFBComm.nsf/840090c16eedaf0085256b61000928dc/076132cfc389d63d85256eb7004e6c15?OpenDocument Amendments to several rules, including those regarding advertising, fees and sex with clients, were made independently of rules review committee. http://www.flcourts.org/sct/sctdocs/bin/sc03-705.pdf
Georgia				No review
Hawaii	X			Disciplinary Board of Supreme Court Ethics 2000 Committee conducting review.
Idaho			X	Revised rules effective 7/1/04. http://www2.state.id.us/isb/bc/irpc_review.htm
Illinois		X		Illinois State Bar Assembly and Chicago Bar Association Board of Governors approved Joint CBA/ISBA report. Report: http://www.isba.org/eth2000.html Article about ISBA Assembly approval (scroll down for third article): http://www.isba.org/Association/047a.htm#gen18
Indiana		X		Supreme Court has issued rules for public comment. http://www.in.gov/iudici/aryrules/proposed/2004/0225.html
Iowa		X		Supreme Court has posted draft for public comment. http://www.judicial.state.ia.us/model_rules/

Kansas	X			State Bar Ethics 2000 Review Task Force conducting review.
Kentucky	X			State Bar Ethics Committee conducting review.
Louisiana			X	Revised rules effective 3/1/04. http://www.lsba.org/Rpc2004.pdf
Maine	X			Supreme Court Advisory Committee on the Rules of Professional Responsibility conducting review.
Maryland		X		Court of Appeals Ethics 2002 Committee has issued its final report. http://www.courts.state.md.us/lawyersropc.html
Massachusetts	X			Supreme Court Standing Committee on Rules of Professional Conduct conducting review.
Michigan		X		State Bar has forwarded proposal to Supreme Court. http://www.michbar.org/directory/proposedmrpc.pdf
Minnesota		X		Supreme Court is considering State Bar Task Force report.
Mississippi		X		State Bar Committee conducting review. Supreme Court approved changes to Rules 7.1, 7.2 and 8.5. http://www.mssc.state.ms.us/news/sn104819.pdf
Missouri		X		Bar has submitted proposal to Supreme Court.
Montana			X	Effective 4/1/04 http://www.montanabar.org
Nebraska		X		Report of Subcommittee to study the Model Rules has been forwarded to Supreme Court.
Nevada		X		State Bar has filed recommendations with Supreme Court. http://www.nvbar.org/Ethics/e2k.htm
New Hampshire		X		Bar Association Ethics Committee has drafted some rules for public comment. http://www.nhbar.org/NHRules.asp
New Jersey			X	Effective 1/1/04 http://www.judiciary.state.nj.us/rules/apprpc.htm

New Mexico	X			Supreme Court Code of Professional Conduct Committee conducting review.
New York		X		State Bar Association Committee on Standards of Attorney Conduct conducting review. Circulating drafts of several rules. http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/NYSBA_Reports/Ordered_by_Topic.htm Scroll down to Code of Professional Responsibility
North Carolina			X	Effective 3/1/03 http://www.ncbar.com/home/proposed_rules.asp
North Dakota	X			Supreme Court and Sate Bar Association Joint Committee on Attorney Standards conducting review.
Ohio		X		Supreme Court Task Force conducting review. Drafts of Rules 1.1 – 1.6 have been prepared. http://www.sconet.state.oh.us/AttySvcs/ProfConduct/default.asp
Oklahoma	X			Rules of Professional Conduct Committee conducting review.
Oregon		X		Bar Board of Governors has approved new proposal based on Supreme Court comments. Will be submitted to House of Delegates in October. http://www.osbar.org/barnews/bogresponse.html
Pennsylvania			X	Revised rules effective 1/1/05. http://www.courts.state.pa.us/OpPosting/Supreme/out/30drd.1attach.pdf
Rhode Island	X			Supreme Court Committee conducting review.

South Carolina		X		Supreme Court Rules Commission conducting review. State Bar Committee submitted report for Supreme Court review. http://www.scbar.org/pdf/ethics2000.pdf
South Dakota			X	Supreme Court approved revisions to Rules of Professional Responsibility. Effective 1/1/04. http://www.sdbar.org/members/Default.htm
Tennessee	X			State Bar Ethics Committee reviewing Ethics 2000 amendments. Tennessee switched to Model Rules format effective 3/1/03. http://www.tba.org/ethics2002.html
Texas	X			State Bar Disciplinary Rules of Professional Conduct Committee conducting review. State Bar Referral Fee Task Force Report has been forwarded to the Supreme Court for review. It includes proposed changes to the rules on fees and advertising. http://www.texasbar.com/Content/ContentGroups/Homepage_Features/RFTFFinal.pdf
Utah	X			Supreme Court Advisory Committee on Rules of Professional Conduct conducting review.
Vermont	X			Subcommittee of the Vermont Supreme Court's Advisory Committee on Rules of Civil Procedure is conducting review.
Virginia			X	Effective 1/1/04 http://www.vsb.org/profguides/rules.pdf

Washington		X		State Bar Special Committee for Evaluation of the Rules of Professional Conduct has submitted report to the Board of Governors. http://www.wsba.org/lawyers/groups/ethics2003/default.htm
West Virginia	X			State Bar Committee conducting review.
Wisconsin	X			State Supreme Court Ethics 2000 Committee conducting review.
Wyoming	X			State Bar Select Committee for Review of Disciplinary Functions conducting review.